

## Section 4 Disputes

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### 5-401 General

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A contract dispute is a disagreement between the contractor and Caltrans over the need to revise the contract or an interpretation of the contract. Disputes take the form of a notice, a protest, a potential claim, or claim. Upon receiving notice of a dispute, the resident engineer must address and resolve disputes in a timely manner.

This section is designed to assist the resident engineer, construction engineer, and other district personnel in handling disputes. We have included procedures and options for resolving disputes, both during contract work and after contract acceptance. Other inclusions consist of a claim process timeline, claim report formatting, documentation procedures, and the responsibilities of district and Division of Construction personnel throughout the dispute resolution process. Our objective is to ensure the correct and timely handling of contract disputes.

Resolving a dispute involves understanding the disputed issue, ascertaining the relevant facts, determining responsibilities, and compensating the contractor if reasons exist for doing so or refusing compensation with clear reasons when no merit exists.

So that the resident engineer can fully analyze disputes, contractors are contractually obligated to provide all the required documentation. If the contractor fails to provide a clear understanding of the issue, along with supporting documentation and calculations, the resident engineer will find it difficult, if not impossible, to determine the merits of a dispute.

On some projects, formal partnering and a dispute review board are available to the resident engineer and contractor to assist in resolving disputes. If a dispute remains unresolved after contract acceptance, the dispute will be handled through the after-acceptance claims resolution process and, potentially, arbitration.

To account for dispute and claim resolution activities on your timesheet, use Activity Code 1290 (federal aid) or Activity Code 2290 (non-federal aid). For more information on these activity codes, refer to Chapter 6, "Activity Codes," of the *Coding Manual*.

### 5-402 Types of Disputes

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Disputes may be divided into four general categories: notices, protests, potential claims, and claims. The *Standard Specifications* and special provisions discuss in detail all four types of disputes.

During the life of the project and up to receiving the proposed final estimate, the contractor must bring any disputes to the resident engineer's attention in the form of a written notice, protest, or a potential claim. Disputes become claims when the contractor lists them as exceptions to the proposed final estimate.

#### 5-402A Notice

A “Notice” applies to unforeseen conditions encountered on the project that were not shown in the plans or detailed in the specifications. Notices are typically required with unforeseen conditions described in Section 5-1.116, “Differing Site Conditions,” Section 8-1.07, “Liquidated Damages,” and Section 8-1.10, “Utility and Non-Highway Facilities,” of the *Standard Specifications*.

#### 5-402B Protest

“Protest” applies to a dispute about the terms or conditions of a contract change order or about the contract time determined on Form CEM-2701, “Weekly Statement of Working Days.” For how to protest a contract change order, see Section 4-1.03A, “Procedure and Protest,” of the *Standard Specifications*. For how to protest the failure of the engineer to recognize a change in character, see Section 4-1.03C, “Changes in Character of Work,” of the *Standard Specifications*. For how to protest contract time, see Section 8-1.06, “Time of Completion,” of the *Standard Specifications*. For more information on protests, also refer to Section 3-403A, “Procedure and Protest,” Section 3-511, “Differing Site Conditions,” and Section 3-805, “Time of Completion,” of the *Construction Manual* (manual).

#### 5-402C Potential Claim

“Potential claim” applies to a dispute between the contractor and Caltrans regarding issues for which the contractor believes additional compensation is due. For the conditions the contractor must satisfy to pursue a potential claim, see Section 9-1.04, “Notice of Potential Claim,” of the *Standard Specifications*.

#### 5-402D Claim

“Claim” refers to disputes (notices, protests, or potential claims) developed during the contract that the contractor lists as exceptions to the proposed final estimate.

### **5-403 Response to Disputes**

#### **5-403 Response to Disputes**

The resident engineer must determine if the contractor’s dispute has merit. If the dispute does have merit, the resident engineer must take appropriate actions within the scope of the contract and within the resident engineer’s authority to resolve the dispute. If the resident engineer cannot resolve the dispute or lacks the authority to act, the resident engineer should discuss the issue with the construction engineer and the structure construction engineer, if appropriate.

When receiving from the contractor a written notice of dispute (notice, protest, or notice of potential claim), note on the written notice of dispute the date and time of receipt and the name of the person receiving the written notice. Ensure the notice of dispute is complete and timely. If the information is not complete, the resident engineer must notify the contractor of the deficiencies and request the notice be resubmitted. (See Example 5-4.1, “Sample Dispute Response Clauses,” later in this section.)

If the contractor failed to submit the notice, protest, or notice of potential claim within the specified time, notify the contractor of this fact and state that Caltrans will not consider the notice. Section 9-1.04, “Notice of Potential Claim,” of the *Standard Specifications*, requires that a notice of potential claim be submitted on Form CEM 6201, “Notice of Potential Claim,” and certified with reference to the False Claims Act, Government Code Section 12650 - 12655. The form contains language referring to the certification. By signing the form the contractor fulfills the certification requirements. If a notice of potential claim is received without certification, notify the contractor that it was not submitted in accordance with Section 9-1.04, “Notice of Potential Claim,” of the *Standard Specifications* and that 15 days will be allowed to certify or withdraw the potential claim. Should certification not

be provided in the required time, notify the contractor in writing that Caltrans will not consider the notice of potential claim. Discuss this latter notification with the construction engineer.

Once a complete notice of dispute has been received and evaluated, send a response letter to the contractor. The response letter should include three basic sections: the dispute background, the contractor's position, and the resident engineer's position.

The background should explain the circumstances that led to the dispute. Include factual information such as events, dates, discussions, meetings, memos, and letters.

The contractor's position is based on supplied information. Use direct quotes from the information the contractor provided. Do not modify the contractor's information by attempting to interpret or clarify it.

The resident engineer's position must be clear and concise as to the merits of the dispute, using contract specifications to support the findings.

The response letter must also request the contractor to state if the contractor agrees or disagrees with the resident engineer's position on the dispute. Request the contractor to clarify those areas where disagreement exists.

When properly prepared as suggested above, the response letter will serve as the basis for the claim position letter and construction claim report should the dispute become a claim.

The following are guidelines for keeping proper records and providing adequate information when responding to notices, protests, and notices of potential claim:

- Ensure factual and accurate reports and documents. Use specific statements in daily reports. An entry such as "Told the contractor that . . ." is not satisfactory, whereas "I told Foreman Smith that..." is satisfactory. A general conclusion as to the effect of a conversation is not helpful; a statement of the conversation is better.
- Answer in writing all letters in which the contractor makes a questionable or erroneous statement, and deny or correct the statement. A written response is particularly important when the contractor appears to have written the letter to form the basis for a claim.
- Do not hesitate to put orders and decisions in writing. Confirm in writing any important statement about the unacceptability of the work. Before ordering the contractor to proceed with extra or additional work, the resident engineer must obtain approval. Again, to avoid potential difficulties, verify such orders in writing. If the contractor verbally informs the resident engineer of a dispute, advise the contractor to comply with the applicable requirement in the *Standard Specifications*. Include this verbal discussion in the resident engineer's daily report.
- On projects with dispute review boards, you can use the response to the contractor's notice of potential claim for the resident engineer's position paper.
- Focus on costs specific to the dispute, but do not discuss any funding availability (the project's contingency balance) with the contractor.
- If a dispute arises during the work's progress, keep accurate records of the operations to eliminate subsequent arguments related to work costs. During the progress of the disputed work, make regular tentative agreements for the labor, equipment, or material quantities.

- Photographs and videos are frequently of great value in establishing job conditions at a particular point in time. Always take preconstruction and project progress photographs. Remember that dated pictures of areas where work is not underway may be as important as the more spectacular pictures of construction operation or completed work. Be thorough in documenting the project's progress.
- Record the full names of all the contractor's personnel involved in any dispute. You may need to locate these people at a later date (address information is in the certified payrolls).
- To help determine and confirm costs associated with claims, take accurate equipment information such as description, model number, contractor's equipment number, size, and capacity.
- Category 62, "Disputes," of the project records must contain copies of all documents related to every dispute on the project. To provide a good basis for documenting claims, follow the procedures outlined in Section 5-1, "Project Records and Reports," of this manual.
- Progress schedules, prepared by the contractor or resident engineer, are very important. Require the contractor to submit, update, and revise, if necessary, the schedule in a timely manner.

## Claims Resolution Process

### 5-404 Claims Resolution Process

After acceptance of the contract, all payments are made in accordance with Section 9-1.07, "Payment After Acceptance," of the *Standard Specifications*. For the handling of these payments, refer to Section 3-910, "Payment After Acceptance," of this manual.

Established milestones ensure the claims process is completed within 240 days after contract acceptance. In the remainder of this section, we refer to these milestones as "Target Day xx." When we refer to the number of days, we mean the number of calendar days elapsed after contract acceptance. For each completed contract, the district must determine milestone dates and monitor the progress of the claims resolution process.

#### 5-404A Issue Proposed Final Estimate—Target Day 45

The district must issue a proposed final estimate within 45 days after contract acceptance and must not postpone the issuance while awaiting additional information from the contractor. Such delays might later be attributed to Caltrans. To prevent any delay in meeting the target date, complete all quantity calculations and adjustments during this period.

#### 5-404B Proposed Final Estimate Returned—Target Day 75

The contractor has 30 days after receiving the proposed final estimate package to review, sign, and return it, either with or without a written statement of claims.

If the contractor returns the proposed final estimate indicating acceptance or the contractor does not return the proposed final estimate within the required 30 days, no further actions are required other than to process the final estimate. If claims are submitted after the 30-day limit, return the entire submittal to the contractor with a cover letter stating that Caltrans will not address the claims because they were not submitted in accordance with the contract.

If the contractor returns the proposed final estimate with a written statement of claims within the 30-day limit, the district construction office must send a copy of the contractor's claim package to the resident engineer, construction engineer, and district construction claims engineer.

#### 5-404C Begin Claim Review—Target Day 80

By day 80, or after receipt of the contractor's written statement of claims, the resident engineer must begin reviewing the claim package and may renew discussions with the contractor. Check the claim package for conformance with the requirements of Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*. Ensure that each claim is the subject of a properly submitted notice, protest, or notice of potential claim, if appropriate. After the contractor has submitted the written statement of claims, no additional clarifying information is allowed unless the resident engineer requests it in writing. Only once during the entire claims resolution process can Caltrans request clarifying information for the contractor's claims. This one-time request must encompass all questions regarding the contractor's entire claims package. Place a time limit (typically 15 days) in which to respond. Failure on the part of the contractor to respond with the requested clarifying information constitutes sufficient reason for denying the claim. The resident engineer's request must be sent by certified mail with return receipt requested.

The nature of the claim will determine the ease with which it can be resolved. Administrative claims are typically straightforward and relatively easy to resolve. Administrative claims include claims for the following:

- Quantity disputes
- Administrative deductions for missing documents
- Adjustments in compensation for overruns and underruns of items
- Interest on late payments made on progress payments or properly submitted daily extra work bills
- Resolution of disputed labor, equipment, and materials as billed on daily extra work reports

If administrative claims have merit, payment may be made through item payments, contract change orders, or by releasing deductions. Accompany payment of these types of claims with a letter stating that the payment resolves the respective claim entirely. If the contractor does not accept the payment as full resolution, refer to Section 5-405, "Claim Payments," later in this section.

Contractual claims generally deal with questions of contract interpretation and may be more complex. Contractual claims may include issues about differing site conditions, liquidated damages, delays, impacts, or inefficiencies. Claims for field and home office overhead and cost escalation associated with delays caused by Caltrans must be supported with an audit by an independent certified public accountant (CPA). The Division of Accounting Services, Office of Audits and Investigations, will review the audit. For additional details, refer to Section 5-406, "Overhead Claims" later in this section.

If contractual claims have merit, prepare a contract change order providing for the compensation determined as due. The contract change order must contain language stating that the payment provides full resolution of the claim specified.

If the contractor is granted additional working days (with proper approval) beyond those shown on the proposed final estimate, add these days to the estimate request for any semifinal estimate. For information on time extensions, refer to Section 3-8, “Prosecution and Progress,” of this manual.

#### 5-404D Field Review of Claims—Target Day 105

The resident engineer and construction engineer are primarily responsible for completing the field review, which they must complete within 105 days of contract acceptance. Involvement of the district construction deputy director or construction manager will depend on the nature and complexity of the claims.

The resident engineer and construction engineer must meet with the contractor to clarify and understand the claims and to attempt resolution. The two engineers must make a concerted effort to resolve all administrative claims at this level and to resolve all contractual claims to whatever extent possible. Limit resolution to the determination of merit allowed by the contract.

Do not delay the claims resolution process because the contractor fails to supply information necessary to evaluate a claim. To allow sufficient time to complete subsequent activities in the total of 240 days, complete the field-level evaluation of claims within the 105-day target.

The resident engineer must diligently pursue the required administrative procedures whether or not the contractor is willing to supply information in a timely manner.

During the field review, the resident engineer and construction engineer may believe that some or all of the claims have no merit. If so, the two engineers must then meet with the construction manager or district construction deputy director to discuss the disputed claims. If the construction manager or district construction deputy director concur, notify the contractor in writing of this decision. The contractor may disagree and ask for a district claim meeting.

#### 5-404E District Claim Meeting—Target Day 115

If the contractor requests a district claim meeting or if the district construction deputy director determines such a meeting would be beneficial, hold a district claim meeting at this time.

This meeting should be informal and facilitated by the construction manager or district construction deputy director. Once you have determined a time and date, send a letter of confirmation to the contractor.

The resident engineer and construction engineer must complete a draft construction claim report no later than one week before a district claim meeting. Clearly label these reports as drafts. For examples of how to write these reports, see Example 5-4.2, “Sample Construction Claim Report,” near the end of this section. To allow sufficient review and discussion of the claims, give the construction manager, the district construction deputy director, the district construction claims unit, and the construction field coordinator an electronic copy and hardcopy of the draft construction claim report.

Coordinate any subsequent editing of the draft construction claim report through the district construction claims unit. Distribute the final draft construction claim report to all those Caltrans personnel who will attend the district claim meeting.

During the district claim meeting, do not accept any additional unsolicited claim information from the contractor.



After the district claim meeting, the district construction deputy director will decide the claim's merit. If the contractor makes pertinent statements at the district claim meeting, include these statements in the construction claim report, beginning with the statement "At the district claim meeting, the contractor stated that . . ."

If the construction manager or the district construction deputy director make the one-time request for additional clarifying claim information at the district claim meeting, include the district's position on the new information in a revised draft of the construction claim report.

The construction engineer, district construction claims engineer, construction manager, and district construction deputy director must all review the revised draft of the construction claim report. For additional review and comments, also send a copy of the revised draft to the construction field coordinator and contract reviewer. After considering all the comments, the district claims unit produces the final version of the construction claim report and distributes it to the district construction deputy director, construction field coordinator, and others for information or filing, as appropriate.

Once the district construction deputy director approves the construction claim report, all drafts (paper or electronic) must be destroyed. At this point in time, do not accept any additional information regarding claims from the contractor.

#### 5-404F District Construction Position—Target Day 135

The district construction deputy director will document the district's position in a claim position letter to the contractor and must send it as a cover letter with the construction claim report. (See Example 5-4.3, "Sample Claim Position Letter," at the end of this section.) Before transmitting the claim position letter and construction claim report to the contractor, the construction division chief must obtain agreement from the construction field coordinator.

For each claim not resolved, the claim position letter must state that no contractual basis exists for the claim.

In issuing the claim position letter, the district construction deputy director is acknowledging that Caltrans has used all possible means of resolution in the claims resolution process. The claim position letter must also state that the contractor may request, in writing within 15 days, a board of review. Generally, the claim position letter should be no longer than one page.

#### 5-404G Board of Review Meeting—Target Day 180

The target date to hold a board of review meeting, a required administrative procedure, is 180 calendar days from contract acceptance. The board of review is an informal meeting allowing the contractor the opportunity to verbally present all unresolved claims. The board of review always convenes when the contractor sends a notification of disagreement with the claim position letter. The board of review must listen to the contractor's presentation and provide timely and fair recommendations to the district director that comply with departmental and contractual requirements.

District and structure personnel involved with the project must attend the board of review meeting. For questions after the meeting is completed regarding complex claims or for first-hand knowledge of events, arrange to have other personnel involved in the project (such as field inspectors, surveyors, and materials testers) available to the board.

#### 5-404G (1) *Board of Review Secretary*

The district will assign a secretary for the board of review. Generally, the district construction claims engineer will serve as the board secretary. Experienced personnel with the requisite organizational and writing skills may also serve as board secretary.

The secretary must do the following:

- Arrange the meeting time and location, and notify the contractor of these details by certified mail a minimum of two weeks before the meeting.
- In the notification, request the contractor to inform Caltrans if the contractor intends to have legal representation present. If the contractor plans to have counsel present at the board meeting, the district should consider having a Legal Service Center representative attend as a legal advisor. A Legal Service Center representative is present only to advise and counsel the board on significant legal issues. Contact the construction field coordinator for advice on including a representative of the Legal Service Center.
- Just before the meeting, verify that the contractor and appropriate subcontractors will attend the meeting.
- Ensure board members have copies of the construction claim report, project plans, and special provisions.
- Perform other tasks in support of the board's efforts.

#### 5-404G (2) *Board of Review Member Selection*

The Division of Construction maintains and manages a list of available board member candidates, and provides a project-specific, member-candidate list to the board secretary. The board secretary, under the direction of the district director, selects the members and confirms the members' acceptance and availability.

Member candidates are district construction deputy directors and construction managers from outside the district, retired annuitants, construction field coordinators for districts other than the district administering the contract, or other Caltrans personnel at the level of supervising transportation engineer or higher. Members must have at least five years of construction experience and be proficient in analyzing construction contract disputes.

Generally, for claims totaling up to \$250,000, the board of review consists of at least one member; for claims totaling between \$250,000 and \$1,000,000, it has two members; and for claims totaling more than \$1,000,000, it has three members. The member or members must have no direct prior involvement with the contract.

One board member is designated as the chairperson. The chairperson informs the meeting attendees of the procedures and format of the meeting and keeps the meeting moving constructively.

#### 5-404G (3) *Board of Review Operation*

The board will hear only those claims presented with the return of the proposed final estimate. The board will not hear or address new claims. Caltrans prohibits recording the meeting by tape, court reporter, or video.

The members of the board of review must conduct the meeting as follows:

- The chairperson must state that the meeting is being conducted in accordance with the *Standard Specifications*, which require a person or board appointed by



the district director to review claims that remain in dispute after the district's completion of the claim review process.

- The meeting will be informal, an approach that allows the board, secretary, contractor, and district personnel to ask questions. Direct all questions to the chairperson.
- Meeting attendees must recognize that the chairperson controls the meeting. Attendees must only respond when board members request a response.
- Each claim begins with a district representative giving a brief description of the project and the subject of the claim.
- The contractor then has the opportunity to present the claim in detail. The district has already presented its position in the claim report; therefore, this meeting is to provide the contractor with an opportunity to give the contractor's side of the dispute.
- If the contractor attempts to submit new information regarding a claim, the board must inform the contractor that Caltrans does not permit additional claims or additional information regarding claims at this time.
- Once the contractor's position has been presented, the board may ask the Caltrans personnel to clarify information from the construction claim report.
- The district must limit its comments to new information not presented in the claim report. This new information must be to clarify points, not to rebut them.
- The board of review does not make recommendations at the meeting.

After the meeting, the board of review members and secretary meet to clarify and set direction for analysis and review of the claim.

Upon reviewing the construction claim report and all information presented by the contractor in the board of review meeting, the board of review must make its decision. Under the direction of the board chairperson with suggestions from the other board members, the board secretary compiles the board of review report. (See Section 5-410, "Board of Review Report and Determination Guidelines," near the end of this section.)

The board members and others, as determined necessary by the board, must review drafts of the board of review report. Once all comments and corrections have been made, the board secretary will finalize the board report and obtain the members' signatures.

For complex claims or claims of a sensitive nature that may have statewide impact, the board members must consult with the Division of Construction before sending the report to the district director.

When all board members have signed the board of review report, the board secretary will prepare a letter of transmittal and a determination of claims, consisting of the board's conclusions. The board's report and the determination of claims will be delivered to the district director for review and signature.

#### *5-404G (4) Board of Review Not Attended*

Failure of the contractor to attend a board of review meeting constitutes a bar to arbitration, in accordance with Section 10240.2, "Administrative Review," of the Public Contract Code. If the contractor's claims are barred from arbitration because of the contractor's failure to attend the meeting, a letter that states these facts will

accompany the final estimate. (For a sample of this letter, see Example 2-70.3, “~~Sample Final Estimate Letter—No Board of Review Attended~~,” near the end of the section.)

If the contractor did not attend a board of review, the final determination of claims is based on the findings in the claim position letter. The final estimate cover letter serves as the final determination of claims and must be signed by the district director. For information on the final estimate cover letter, see Section 3-914, “Final Estimate,” of this manual.

#### *5-404G (5) Board of Review Settlements*

The board of review may determine that a negotiated settlement of the claims is appropriate. Settlements negotiated by the board of review chairperson will be submitted as a claim settlement report directly to the Division of Construction. The board secretary prepares the claim settlement report. Do not submit the claim settlement report to the district director until it has been forwarded to the Division of Construction. (For information on preparing a claim settlement report, see Section 5-405B, “Claim Payments Based on Negotiated Settlements,” later in this section.)

#### 5-404H Final Determination of Claims—Target Day 240

The determination of claims is the “final determination” and completes the claims resolution process. Caltrans’ goal is to deliver the final determination of claims to the contractor no later than 240 days after contract acceptance.

The board secretary, with the assistance of the district construction claims unit, will send the determination of claims to the contractor. Once the determination is sent, the contract is finalized on the basis of the information contained in the determination. The district claims unit will then request the resident engineer to prepare a unilaterally approved contract change order to make any final payment.

The resident engineer must then process the final estimate, reflecting any payments as stated in the determination of claims. Other than sending a copy of the final estimate to the contractor, no further contact or discussion is necessary with the contractor.

The district must issue the final estimate within 30 days of issuing the final determination of claims. For information on the final estimate cover letter, see Section 3-914, “Final Estimate,” of this manual.

With the completion of the claims resolution process, Caltrans has fulfilled the contractual requirements. The district must store all project records in accordance with the procedures outlined in Section 5-104, “Final Construction Project Records,” of this manual.

If the contractor has diligently pursued and exhausted the administrative procedures specified in the contract, the contractor is entitled to file for arbitration of its claims 240 days after contract acceptance even if the final determination of claims has not been issued. Therefore, the district must make every effort to issue a final determination on all claims within this timeframe. Should the 240 days elapse and a final determination on all claims has not been issued, the district must consult with the construction field coordinator and the Legal Service Center on how to proceed.

If the contractor chooses to pursue arbitration, the contractor must file for arbitration within the time specified in Section 10240.1, “Commencement of Arbitration,” of the Public Contract Code.

## 5-405 Claim Payments

When an agreement is reached with the contractor or entitlement is found on a claim, make payments immediately. Make these payments as described below and in accordance with Table 5-4.1, “Delegation of Authority,” near the end of this section. For detailed information on contract payments, refer to Section 3-9, “Measurement and Payment,” of this manual.

### 5-405A Claim Payments Based on Entitlement

If all claims are resolved at the field level or as a result of the district claim meeting, the resident engineer can process a final estimate as soon as a contract change order for a claim resolution is executed and approved. If only some of the claims are resolved, the resident engineer must process a semifinal estimate to release the payments for the resolved claims.

If a claim has some merit and may warrant partial payment of the claimed amount, yet the contractor does not agree this partial payment results in full resolution, the district must discuss how to proceed with the construction field coordinator. The claim position letter must address these types of claims by either finding no merit or finding merit on those specific issues with entitlement to be paid as a unilaterally approved change order, if necessary.

If the board of review determines that money is owed to the contractor, the district should process a unilaterally approved contract change order and then process a final estimate.

### 5-405B Claim Payments Based on Negotiated Settlements

A negotiated settlement is defined as a compromise of the contract requirements to settle a dispute in Caltrans’ best interest. Negotiated settlements of claims may arise when both Caltrans and the contractor contributed to the disputed issue and total responsibility is difficult to attribute to either party. In these situations, the district or the board of review should explore the possibility of settlements with the contractor.

Before presenting actual negotiated settlement offers to the contractor, write a claim settlement report. The claim settlement report must include the following items:

- The scope of the negotiated settlement, including terms and conditions
- Resolution of specific claims or potential claims
- Compromises made in Caltrans’ best interest
- Reasons for the compromises
- Methods of payment

Table 5-4.1, near the end of this section, lists the requirements for submittal, recommendation for approval, and approval of the claim settlement report. After approval, bring the negotiated settlement to the contractor for agreement.

If the contractor agrees to the negotiated settlement, prepare a contract change order. The contract change order memorandum must reference the corresponding claim settlement report. However, the contract change order memorandum may not substitute for a claim settlement report, even if the subject matter is simple and can be briefly written. The contract change order must include a statement that signifies the contractor is accepting the compensation provided for in the contract change order as full resolution and settlement of the claim. The contract change order must be signed by the contractor.

## 5-405 Claim Payments

The claim settlement report is an internal document covered by the confidential attorney-client communication privilege and must not be given to the contractor or included in the project files. File the original claim settlement report in the Division of Construction confidential files. Also, after approval of the final claim settlement report, destroy all hardcopy and electronic drafts. Do not distribute copies of the final claim settlement report.

## **5-406 Overhead Claims**

Overhead claims generally fall into two categories, home office overhead and field office overhead. All overhead claims must be supported by audit. Overhead claims generally occur when there have been delays to the completion of the contract.

### 5-406A Home Office Overhead

Home office overhead, or general and administrative expenses, consist of indirect costs that are not associated with a specific project but are the costs of general facilities and administration necessary for the contractor's performance on all contracts.

### 5-406B Field Office Overhead

Field office overhead consists of indirect costs that are associated with a specific project. These costs do not include costs for labor, materials, or equipment used in performing the work.

### 5-406C Contractor Submitted Audits

Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*, requires that an independent audit report by a certified public accountant (CPA) accompany and support any claim for overhead expenses. The audit report must be prepared at the contractor's expense. When a claim for overhead expenses is received without an independent audit to justify the claimed amount, notify the contractor that the submittal is incomplete and will not be considered until an independent CPA audit report is received. Failure to comply with the request justifies denying the overhead claim.

The Division of Accounting Services, Office of Audits and Investigations, will assist the resident engineer by performing a preliminary check of the independent audit report's compliance with the requirements of the American Institute of Certified Public Accountants (AICPA) Attestation Standards. In addition, the Division of Accounting Services, Office of Audits and Investigations, may review the Caltrans project files and audit the contractor's records.

The Division of Accounting Services, Office of Audits and Investigations will perform the Caltrans audit only if the following conditions exist:

- The district has determined that the state caused a delay to project completion.
- The contractor has submitted an independent CPA audit report that conforms to the AICPA Attestation Standards.
- The Division of Construction has received and prioritized the audit request.
- The contractor has fulfilled the provisions of Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*.

For information about requesting an audit, see Section 5-407A, "Audit Request Procedure," later in this section.

### 5-406D Overhead Payments

Approval of overhead claim payments is subject to the following:

#### *5-406D (1) Home Office Overhead*

- Payment less than \$500,000 requires approval from the Division of Construction chief
- Payment greater than \$500,000 requires approval from the deputy director of Project Delivery

#### *5-406D (2) Field Office Overhead*

- Payment less than \$200,000 requires approval from the construction field coordinator
- Payment from \$200,000 to \$ 500,000 requires approval from the Division of Construction chief
- Payment greater than \$500,000 requires approval from the deputy director of Project Delivery

### **5-407 Audits**

The Division of Accounting Services, Office of Audits and Investigations, can review contractor submitted audits for overhead claims and perform audits of contractor claims such as home office overhead, field office overhead, labor and material cost escalation, and inefficiency costs. These types of claims are generally related to delays to the completion of the contract.

The resident engineer and construction engineer must determine that the claims have entitlement before requesting assistance from the Division of Accounting Services, Office of Audits and Investigations.

#### 5-407A Audit Request Procedure

When it is determined that an audit by the Division of Accounting Services, Office of Audits and Investigations, is needed the resident engineer prepares the district's audit request memorandum for the district construction deputy director's signature. Before forwarding the audit request to the Division of Construction, the district construction deputy director must obtain a signature of concurrence from the construction field coordinator.

The memo must include the following information as appropriate:

- Contract's number
- Contractor's name
- District contact person's name, title, and phone number
- Board of review secretary's name
- A justification

The justification must explain the reasons the contractor has entitlement on the claims and the associated costs that a Caltrans audit needs to verify. The justification must be accompanied by a summary of delay-related claim descriptions and amounts. For a sample summary of delay-related claims, see Example 5-4.6, "Attachment to Audit Request—Summary of Delay-Related Claims," near the end of this section.

### **5-407 Audits**

Upon receipt of the district's audit request memorandum, the Division of Construction prioritizes the audit request and sends a memorandum to the audit manager of the Division of Accounting Services, Office of Audits and Investigations, requesting an audit of delay-related claims or review of the contractor submitted audit. The Division of Accounting Services, Office of Audits and Investigations, aims to complete the audit within 45 days after receiving the audit request.

#### 5-407B Final Audit Report

The Division of Accounting Services, Office of Audits and Investigations, will perform the audit and forward the final audit report to the Division of Construction. The final audit report is a matter of public record, and its distribution is not limited.

After the Division of Construction receives the final audit report, the construction field coordinator and contract reviewer meet to discuss the report. The construction field coordinator and the district or board of review members will then use the final audit report to determine recoverable costs.

The Division of Construction will keep the final audit report and the audit request for four years.

#### 5-407C Unallowable Expenses

All expenses relating to other business of the contractor must be excluded from the claimed expenses for field office overhead and home office overhead. For typical unallowable expenses, see the Code of Federal Regulations, Title 48, Part 31.205 (48 CFR 31.205).

### **5-408 Arbitration**

Section 9-1.10, "Arbitration," of the *Standard Specifications*, specifies the requirements for arbitration.

Caltrans Legal Service Center handles all arbitrations. Consequently, when a contractor files for arbitration, all contacts with the contractor regarding the specific project must go through the designated attorney. The resident engineer, the construction engineer, and others, must assist in the arbitration. This assistance may involve preparing calculations, performing technical analysis, preparing documents, assisting in the discovery process, and providing testimony.

For the Legal Service Center's access and ease of discovery, keep project records at one location.

### **5-409 Construction Claim Report Guidelines**

Caltrans uses a construction claim report to document, in an objective and orderly manner, detailed information regarding unresolved claims so that the reader will clearly understand the facts and both sides of the claim. The following guidelines establish the format, content, and suggestions for writing a construction claim report.

#### 5-409A Format

A construction claim report consists of the following sections:

- Title page
- Table of contents
- Project chronology
- General information
- Summary of Resolved Claims (if applicable)



- Summary of Unresolved Claims
- Claim number, title, claim amount
- Background
- Contractor's position
- District's position
- Conclusion
- Exhibits

#### 5-409B Content

The following subsections list in more detail the information that must be included in the construction claim report.

#### *5-409B (1) Title Page*

The title page must state the following information:

- "Construction Claim Report"
- "DRAFT" (if appropriate)
- Contract identification data (that is, contract number, district, county, route, kilopost, and federal project number, if applicable)
- Applicable *Standard Specifications* and *Standard Plans*
- Names of the contractor, resident engineer, structure or district representative, construction engineer, structure construction engineer, and report author
- Date of report

#### *5-409B (2) Table of Contents (with page numbers)*

The Table of Contents must list the following:

- Each section
- Claim subsections
- All exhibits

#### *5-409B (3) Project Chronology*

The project chronology includes the following, as appropriate:

- Advertisement date
- Bid opening date
- Contract award date
- Contract approval date
- First working day (date and working day number)
- Date contractor began work
- Working days specified (number of days)
- Computed completion (date and working day number)

- Contract change order time adjustment (number of days)
- Other days extension (number of days)
- Nonworking days (number of days)
- Suspension days (number of days)
- Working days not worked on controlling operation (number of days)
- Extended date for completion (date and working day number)
- Date work completed
- Contract acceptance date
- Overrun in contract time (number of working and calendar days)

#### 5-409B (4) *General Information*

Use a narrative format for this section, and include the following:

- Description of the work (preferably one short paragraph)
- Contractor's bid amount
- Proposed final estimate amount
- Date the proposed final estimate was sent to the contractor
- Estimated final cost from proposed final estimate
- Date the contractor returned the proposed final estimate with claims
- Total number and amount of claims submitted
- Dates and descriptions of claim resolution meetings

#### 5-409B (5) *Summary of Resolved Claims (if applicable)*

If resolved claims exist, prepare a summary table including the following information:

- Numbers and titles
- Claimed amounts
- Resolved amounts

#### 5-409B (6) *Summary of Unresolved Claims*

Use a table for unresolved claims that uses the same format as the resolved claims table, but do not include a column for resolved amounts. You may omit this summary table if only a few claims exist.

#### 5-409B (7) *Claim Number, Title, Claim Amount*

Use a boldfaced, underlined title bar for each unresolved claim. In a left-hand column, put the claim number; in the middle column, put the claim title; and in the right-hand column put the claim amount, including days.

#### 5-409B (8) Background

In this section, use a narrative for each claim, including the following types of information:

- Explanations about what happened on the project and what the contract required.
- Facts, not opinions.
- Applicable specifications relevant to the issue. For clarity, you may include a separate section entitled “Applicable Specifications,” listing the section numbers and excerpts.
- The circumstances leading to each claim. Use undisputed facts supported with exhibits, where applicable. Exhibits for the facts should include daily reports or letters.
- If the claim includes time considerations, include relevant dates.
- Any actions and responses of the Caltrans’ representatives and contractor’s personnel.
- The method and time of notification of the dispute. Note the verbal notice of a dispute as well as the response. Clarify how the notice was presented. If the notification was complicated, place this information in a separate section entitled “Notification of Claim.”

#### 5-409B (9) Contractor’s Position

Quote directly from the contractor’s protest, notice, notice of potential claim, or written statement of claims. Add any other pertinent information provided in other documentation. Do not interpret the contractor’s position. If the contractor has not stated a basis for the claim, then note that the basis was not stated. State whether a cost analysis was submitted.

#### 5-409B (10) District’s Position

Keep this section brief, and avoid repeating or adding background information. State the district’s position on each identified issue clearly, directly, and positively. Respond only to relevant contractor points. Do not address or respond to points that are not relevant to the claim’s merits. However, make as many relevant arguments as you can to support the position.

#### 5-409B (11) Conclusion

State the district’s conclusions on the claim’s merit. Briefly state the reason for the conclusions based on the information provided in the report. Do not deny the claim. Only the district director has the authority to deny. You can only recommend denial based on no merit.

#### 5-409B (12) Exhibits

Include the following exhibits as appropriate:

- Copy of the contractor’s written statement of claims (that is, the response to the proposed final estimate).
- Correspondence.

- Cost data.
- Notices, protests, or notices of potential claim.
- Detailed chronology of correspondence, other documents, or events.
- CPM schedules or time impact analysis.
- Photographs.

#### 5-409C Suggestions

Use the following suggestions in preparing the construction claim report.

#### *5-409C (1) Helpful Hints*

When preparing the construction claim report, the following hints may help:

- Identify specific references in the following manner: “Section xx of the special provisions requires. . . .”
- Quote all excerpts. Avoid paraphrasing them.
- Try to include all pertinent correspondence.
- Include pertinent photographs.
- Provide a response to every relevant contention that the contractor makes.
- As much as possible, use exact dates and numbers.
- State whether days are working or calendar.
- When referring to days, when applicable, include the month, day number, and year.

#### *5-409C (2) Things To Avoid*

When preparing the construction claim report, avoid the following:

- Using the words “denied,” “rejected,” or “determined.” Only the district director can use these terms in the final determination.
- Referring to the district claim meeting as “a hearing” when including comments made at the district claim meeting.
- Including a copy of Sections 1 through 9 of the *Standard Specifications*.
- Making the background section of the district’s position simply a chronology of letters or events. Write the background as a narrative, referencing any relevant letters or events, if appropriate.
- Including correspondence, photographs, or other exhibits that have no direct bearing on the claim (although all pertinent information should be included).

### **5-410 Board of Review Report and Determination Guidelines**

#### **5-410 Board of Review Report and Determination Guidelines**

The district director uses the board of review report to make a final determination of claims. The following establishes the format, content, and guidelines for writing a board of review report and a board of review determination.



#### 5-410A Format

A board of review report follows the general format of a construction claim report. Divide the report into the following sections:

- Introduction written by the board or board secretary and project description, based on the construction claim report
- Chronology, based on the construction claim report
- General information, based on the construction claim report
- A summary of settled claims, if applicable, based on the construction claim report
- Claim number, title, claim amount
- General description of the claim from the construction claim report
- Background, based on the construction claim report
- Contractor's position, based on the construction claim report
- District's position, based on the construction claim report
- Comments of the board, to be written by the board or board secretary
- Conclusions of the board, to be written by the board or board secretary

#### 5-410B Content of Board of Review Report

After the board of review meeting, write the introductory paragraph and add the last two sections, "Comments of the board" and "Conclusions of the board." (See sections 5-410B (1), (2), and (3) for additional information).

Here are some additional guidelines in preparing the report:

- Exhibits in the construction claim report must not be attached to the board report, you may need to do some editing of the contractor's and the district's positions to remove references to the exhibits.
- Do not edit the actual positions as stated in the construction claim report.
- As much as possible, match the construction claim report's style and format, for instance by using the same font size and font type.
- In the top right-hand corner of each page, place the district director's name, the date, and the page number.
- State opinions, facts, positions, conclusions, determinations, and recommendations. However, the important items to present are facts, contract language, and the results of applying the contract to the facts. Do not use words such as "think," "feel," and "believe."
- Quantify any item that can be quantified. If the contractor was inefficient, state that conclusion's basis. If such inefficiency occurred frequently, state how many times and over what time frame.
- Do not include tables in the board conclusions.
- Begin each individual claim on a new page.
- Do not include any language indicating that the report's conclusions comprise the final determination. For all claims, the district director makes the final determination.

- Include signature blocks for the board members and the district director.
- Place all signature blocks on the same page as the final portion of the report's text.

The following subsections contain information specific to the board of review report.

#### *5-410B (1) Introduction*

The board of review report must start with an introductory paragraph describing the board meeting attendees and date of occurrence. This section should also include a project description that can be taken from the construction claim report.

#### *5-410B (2) Comments of the Board*

In this section of the report, include the following:

- Any new material or a change in position if raised by the contractor at the board meeting.
- Any board requests for additional information or analysis and any general discussion of that information or analysis.
- Other information or statements that are not appropriate in other sections, but which the board considers relevant to the issue and to possible future litigation.

The following are some examples of clauses you can use in this section:

- “At the board of review meeting, the contractor informed the board that . . .”
- “At the board of review meeting, the contractor submitted additional information to support its claim.”
- “At the request of the board, the resident engineer reviewed the contractor's submittal and noted . . .”
- “The resident engineer informed the board . . .”
- “At the request of the board . . .”

#### *5-410B (3) Conclusions of the Board*

Format this section of the board of review report as a series of bullets that list the board's conclusions. Ensure the bullets convey the board's reasoning and follow a progression that shows what was required, what happened, and what the board determined was relevant to its conclusion. The following are some examples of phrases you can use in the conclusions, beginning with the statement “The board concluded . . .”:

- That the contract provided for . . .
- That the work included . . .
- That pursuant to Item No., item description . . .
- That the contract further provided . . .
- That the contract time is subject to extensions for . . .
- That work began on (date)



- That by correspondence dated (date) . . . the contractor directed the engineer's attention to . . .
- That the contractor requested issuance of a contract change order to provide compensation for . . .
- That the resident engineer disputed the contractor's request and directed the contractor's attention to Section xx of the *Standard Specifications*.
- That on (date) the contractor submitted a notice of potential claim, dated (date) . . . at an estimated costs of \$ value.
- That with the return of the proposed final estimate the contractor included a claim for \$.
- That the contractor has been compensated for the work of Item No. and that the contractor is not entitled to any additional compensations for that work.

For each claim, end the conclusions with the statement: "Therefore, it is recommended that the claim be denied/allowed in the amount of \$."

Also, list the findings of facts as to what actually occurred, including only facts the board can state with certainty. Do not guess or use unverified information in the conclusion.

The board's conclusions are not a settlement of the claim. Instead, it is a complete analysis of the contractor's dispute, beginning with the contract provisions or what the work included. The concluding statement includes the board's recommendation to the district director.

For a sample electronic file of a board of review report, contact the Division of Construction.

#### 5-410C Content of Board of Review Determination

Once the board of review report is complete, prepare a final determination. The final determination consists of the introductory paragraph and the board's conclusions from the board of review report. Change the last conclusion to state "That the claim is denied" or "That the claim is allowed in the amount of \$."

Only the district director's signature appears on the final determination. The board of review secretary sends the final determination to the contractor with a cover letter.

**Table 5-4.1 Delegation of Authority**

CLAIM ADMINISTRATION		
PERIOD	ITEM	ENTITLEMENT AUTHORITY (see Note 1)
Prior to Issuance of Proposed Final Estimate	Notices of Potential Claim and Protests	Approvals of contract change orders resolving entitlement potential claims and protests are subject to the delegation authority for contract change orders.
Return of the Proposed Final Estimate Until Board of Review Meeting	Claims	<p>Approvals of contract change orders resolving entitlement claims are subject to the delegation authority for contract change orders.</p> <hr/> <p>Entitlement claim contract change orders subject to district approval (for overhead claims, see Note 2):</p> <ul style="list-style-type: none"> <li>– District construction deputy director approves contract change orders, may not be delegated to construction engineers (may be delegated to construction managers).</li> <li>– Fax copy to the contract reviewer for information.</li> </ul> <hr/> <p>Entitlement claim contract change orders subject to Division of Construction approval (for overhead claims, see Note 2):</p> <ul style="list-style-type: none"> <li>– District construction deputy director provides signature under “submitted by” on contract change order memorandum (see Note 3).</li> <li>– Construction coordinator provides signature of approval on contract change order memorandum (see Note 3).</li> </ul> <p>Approval of the contract change order is subject to the normal delegation of authority for contract change orders.</p>
		<p>Approvals of contract change orders resolving entitlement claims are subject to the district director’s determination and the delegation authority for contract change orders.</p> <hr/> <p>Entitlement claim contract change orders subject to district approval (for overhead claims, see Note 2):</p> <ul style="list-style-type: none"> <li>– District construction deputy director approves contract change orders, may not be delegated to construction engineers (may be delegated to construction managers).</li> <li>– Fax copy to the contract reviewer for information.</li> </ul> <hr/> <p>Entitlement claim contract change orders subject to Construction Program approval (for overhead claims, see Note 2):</p> <ul style="list-style-type: none"> <li>– District construction deputy director provides signature under “submitted by” on contract change order memorandum (see note 3).</li> <li>– Construction coordinator provides signature on contract change order memorandum (see note 3) recommending approval.</li> <li>– Division of Construction chief provides signature of approval on contract change order memorandum (see note 3).</li> </ul> <p>Approval of the contract change order is subject to the normal delegation of authority for contract change orders.</p>
Board of Review Meeting to Final Estimate	Claims	<p>Approvals of contract change orders resolving entitlement claims are subject to the district director’s determination and the delegation authority for contract change orders.</p> <hr/> <p>Entitlement claim contract change orders subject to district approval (for overhead claims, see Note 2):</p> <ul style="list-style-type: none"> <li>– District construction deputy director approves contract change orders, may not be delegated to construction engineers (may be delegated to construction managers).</li> <li>– Fax copy to the contract reviewer for information.</li> </ul> <hr/> <p>Entitlement claim contract change orders subject to Construction Program approval (for overhead claims, see Note 2):</p> <ul style="list-style-type: none"> <li>– District construction deputy director provides signature under “submitted by” on contract change order memorandum (see note 3).</li> <li>– Construction coordinator provides signature on contract change order memorandum (see note 3) recommending approval.</li> <li>– Division of Construction chief provides signature of approval on contract change order memorandum (see note 3).</li> </ul> <p>Approval of the contract change order is subject to the normal delegation of authority for contract change orders.</p>

Entitlement Notes:

1. Entitlement – merit, even partial, requiring compensation per Public Contract Code Section 10227 “Changes of Plans and Specifications” and per Construction Manual Section 2-04 “Changes”
2. Signature of approval on contract change order memo for overhead entitlement:
  - Field office overhead < \$200k coordinator approves, \$200k < field office overhead < \$500k Division of Construction chief approves, field office overhead > \$500k deputy director, Project Delivery approves.
  - Home office overhead < \$500k Division of Construction chief approves, home office overhead > \$500k the deputy director of Project Delivery approves.
3. Revise the contract change order memorandum as appropriate



## Negotiated settlement authority

CLAIM ADMINISTRATION		
PERIOD	ITEM	NEGOTIATED SETTLEMENT AUTHORITY (see Note 1)
Start of Work Until Final Estimate	Notices of Potential Claim, Protests, and Claims	<p>Claim settlement reports must be submitted to the Division of Construction for all negotiated settlements, with no exceptions. The contract change order memorandum may not be used in lieu of the claim settlement report. The contract change order and contract change order memorandum must be attached to the claim settlement report prior to sending to the Division of Construction.</p> <p>Approval of claim settlement reports resolving settlement of potential claims, protests, and claims is subject to the delegation noted below:</p> <p>&lt; <b>\$500K</b> The district prepares claim settlement report (see Note 2).</p> <ul style="list-style-type: none"> <li>– Construction division chief submits claim settlement report for approval (see note b).</li> <li>– Construction coordinator recommends approval.</li> <li>– Legal Service Center recommends approval.</li> <li>– Division of Construction chief approves.</li> </ul> <p>&gt; <b>\$500K</b> The district prepares claim settlement report (see Note 2).</p> <ul style="list-style-type: none"> <li>– District director submits claim settlement report for approval (see note b).</li> <li>– Construction coordinator recommends approval.</li> <li>– Legal Service Center recommends approval.</li> <li>– Division of Construction chief recommends approval.</li> <li>– Deputy director of Project Delivery approves.</li> </ul> <p>claim settlement report notes:</p> <ul style="list-style-type: none"> <li>a. Approval of the corresponding contract change order is subject to the normal delegation of authority for contract change orders. The contract reviewer will either provide a contract change order authorization or notify the district to authorize the contract change order.</li> <li>b. The board of review chairperson submits claim settlement report for approval for the district director if it is submitted after the board of review meeting.</li> <li>c. The approved claim settlement report is filed in the Division of Construction confidential files. All drafts should be destroyed.</li> </ul>

### Negotiated Settlement Notes:

1. Negotiated settlement – Per Public Contract Code Section 9201, “Authority to Compromise Claims,” and per the *Construction Manual* Section 5-405B, “Claim Payments Based on Negotiated Settlements.”
2. Coordinator, Office of Contract Management chief, district construction deputy director, Legal Service Center representative, and Division of Construction chief meet to discuss negotiated settlement offer. If the amount is greater than \$500K, the deputy director of Project Delivery may also attend meeting.

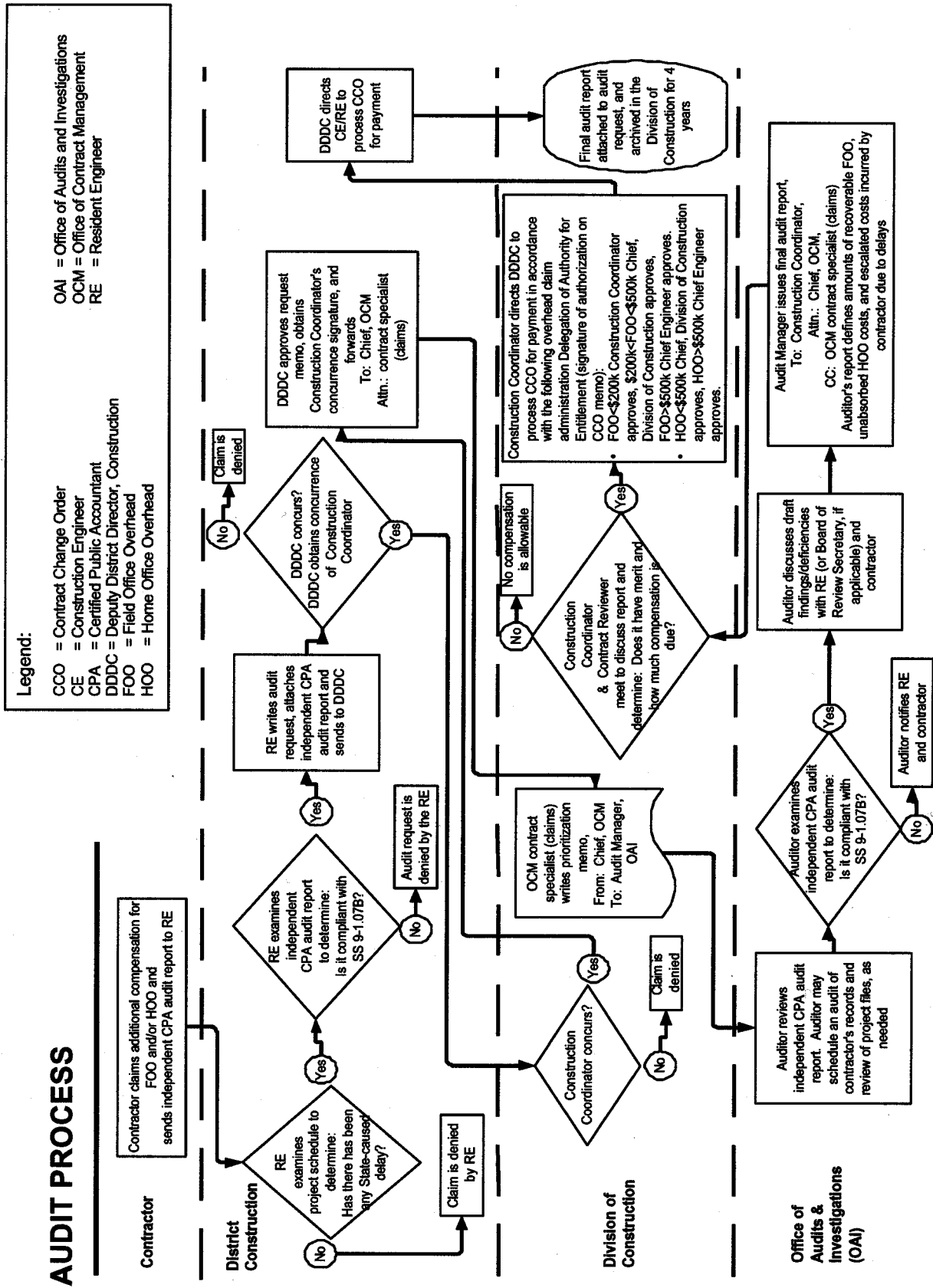
### Claim Arbitration (cont')

CLAIM ARBITRATION		
PERIOD	ITEM	NEGOTIATED SETTLEMENT AUTHORITY (see Note 1)
Request for Arbitration Filed Until Arbitration	Settlement Offers Meeting: Occurs when a contractor offers to settle claims prior to judgement.	Approval of claim settlement reports to settle claims in arbitration are subject to the following delegation: < <b>\$500K</b> Legal Service Center prepares claim settlement report (see Note 2).
	Pre-Discovery Settlement Meeting: May be requested by Legal Service Center to consider issuing a settlement offer.	<ul style="list-style-type: none"> <li>– Coordinator recommends approval</li> <li>– District construction deputy director recommends approval.</li> <li>– Division of Construction chief approves.</li> </ul>
	Post-Discovery Settlement Meeting: Requested by Legal Service Center or Construction Program to consider issuing a settlement offer.	<ul style="list-style-type: none"> <li>– <b>≥ \$500K</b> Legal Service Center prepares claim settlement report (see Note 2).</li> <li>– Division of Construction chief recommends approval</li> <li>– District director recommends approval</li> <li>– Deputy director of Project Delivery approves.</li> </ul>
Arbitration	Settlements: Contractor offers or Caltrans issues prior to arbitrator award.	District issues contract change order with an “issue and approve” from the Construction Program.
	Awards	<ol style="list-style-type: none"> <li>1. If additional funding required, district processes request.</li> <li>2. District issues contract change order with an “issue and approve” from the Construction Program.</li> </ol>

**Negotiated Settlement Notes:**

1. Negotiated settlement – Per Public Contract Code Section 9201 “Authority to Compromise Claims” and per the Construction Manual Section 5-405B, “Claim Payments Based on Negotiated Settlements.”
2. Coordinator, Office of Contract Management chief, district construction deputy director, Legal Service Center representative, and Division of Construction chief meet to discuss negotiated settlement offer. If the offer amount is greater than \$500K, the deputy director of Project Delivery may also attend the meeting.

Table 5-4.2 Audit Process



### Example 5-4.1 Sample Dispute Response Clauses

The following are some sample clauses you can use in response to disputes. Edit the clauses to fit the specific situation.

#### 5-410D Notice

For a discussion of notices, see Section 5-402A, “Notice,” of this manual. Use the following information in your response to a notice.

##### *5-410D (1) General*

I have received your written notification dated May 4, 1999, of a differing site condition encountered at (give location). It is my understanding that you are of the opinion that the material encountered differs materially from that shown on the plans or is considered to be of an unusual nature . . .”

##### *5-410D (2) If no merit*

“I have investigated the material and contract documents (specify which documents) and have found that the material does not vary from that shown on the contract documents. Therefore, no additional cost or time is warranted to complete the work. If you still feel a differing site condition exists, please provide me with any additional information you may have.”

##### *5-410D (3) If merit*

“I have investigated the material and contract documents, (specify which documents) and have found that the material does vary from that shown on the contract documents. Therefore, additional cost or time is warranted to complete the work. Please furnish me with the additional costs that may result from the increased work as a result of this differing site condition.”

#### 5-410E Protest

For a discussion of protests, see Section 2-7002B, “Protest,” of this manual.

##### *5-410E (1) Contract Change Order Time Adjustment*

Use the following information in your response to a protest of time determination in a contract change order.

##### 5-410E (1a) General

“I have received your letter of protest, dated May 4, 1999, regarding the time adjustment under contract change order No. 16. I understand that you are protesting the determination of (x) working days time extension for this change and you believe you should be entitled to (y) working days.”



5-410E (1b) If no merit

“My review of the contract change order, anticipated work, and the progress schedule indicates that the work required by contract change order No. 16 is not the controlling operation [if a CPM review was performed substitute “critical path” for “controlling operation”]. Therefore you are not entitled to a time extension. If you still believe that a time extension is warranted, please provide documentation, either in narrative form or an analysis showing the impact this work on the completion of the project.”

5-410E (1c) If merit

“My review of the change order, anticipated work, and the progress schedule indicates that the work associated with contract change order No. 16 is the controlling operation [if a CPM review was performed substitute “critical path” for “controlling operation”]. Therefore you are entitled to a time extension. I have determined a time extension of (x) days associated with the work. The contract change order will be revised to reflect this change in the adjustment of contract time. Review and sign the contract change order if you agree with the change.”

*5-410E (2) Weekly Statement of Working Days*

Use the following information in your response to a protest of time determination in a weekly statement of working days.

5-410E (2a) General

“I have received your letter of protest, dated May 4, 1999, regarding weekly statement of working days No. 8. It is my understanding that you are protesting the charging of (specify day or days protested) as a working day because (specify the contractors reasons for protesting the days in question).”

5-410E (2b) If no merit

“My records indicate that you were working on the controlling operation for the entire day. If you believe that you did meet the requirements of Section 8-1.06, “Time of Completion,” of the *Standard Specifications*, please provide me with documentation. Otherwise, I can find no merit to your protest and therefore the charging of a working day will stay in effect.”

5-410E (2c) If merit

“I have reviewed the project records and have determined that April 22, 1999, should be revised to indicate a non-working day. I will send you a revised weekly statement of working days.

#### 5-410F Notice of Potential Claim

For a discussion of the notice of potential claim, see Section 5-402C, “Potential Claim,” of this manual. Use the following information in your response to a notice of potential claim.

##### *5-410F (1) General*

“I have received your notice of potential claim dated May 4, 1999, regarding (state issue). It is my understanding that this potential claim is the result of a dispute over (state dispute and give background of the dispute).

I understand your position to be .... (quote the contractor’s position as described in the notice of potential claim)”

##### *5-410F (2) If no merit*

“I have reviewed your potential claim and based on the information you provided I find that it has no merit. (Explain why.)”

##### *5-410F (3) If merit*

“I have reviewed your potential claim and based on the information you provided I find that it has merit. (Explain why.) Please provide me with the cost associated with your notice of potential claim for my review and determination of compensation.”

#### 5-410G Request for Information

“I have reviewed your notice of potential claim, and I am unable to make a determination based on the information you provided. Please provide me with the following information so I can make a determination regarding your potential claim.”

## Example 5-4.2 Sample Construction Claim Report

DEPARTMENT OF TRANSPORTATION  
CENTRAL REGION

10-123454  
10-ALP-88-0.2

CONSTRUCTION CLAIMS REPORT FOR PROJECT

IN DISTRICT 10

ON

STATE ROUTE 88

LOCATED IN

ALPINE COUNTY ABOUT 90.4 KM EAST OF JACKSON AT KIRKWOOD CREEK

Applicable Standard Specifications - 1995 Edition

Applicable Standard Plans - 1995 Edition

I BUILT MORE CONSTRUCTION, INC.

CONTRACTOR

RE Name

RESIDENT ENGINEER

CE Name

CONSTRUCTION ENGINEER

June 6, 2000

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### EXHIBITS

Exhibit 1 Contractor's written statement of claims and certification.....	2 Sheets
Exhibit 2 Notice of Potential Claim.....	1 Sheet
Exhibit 3 Resident Engineers Response to the Notice of Potential Claim...	1 Sheet

## CHRONOLOGY

<u>EVENT</u>	<u>WORKING DATE</u>	<u>DAY NO.</u>	<u>NO. OF DAYS</u>
Advertisement date	05-24-99		
Bid opening date	06-22-99		
Contract award date	07-19-99		
Contract approved date	07-30-99		
First working day	08-16-99	620	
Begin work	08-16-99		
Working days specified			45
Computed completion date	10-20-99	664	
Contract change order time adjustment			0
Non-working days			6
Suspension days			1
Working days that contractor did not work on the controlling operation			0
Extended date for completion	10-29-99	671	
Date work completed	10-15-99	661	
Contract acceptance date	10-15-99	661	

Overrun in contract time 0 working days (= 0 calendar days)

## GENERAL INFORMATION

### GENERAL

This project consisted of replacing existing culverts with a pre-cast concrete box culvert. Also, existing highway 88 was realigned by placing asphalt concrete over aggregate base over imported borrow. Metal beam guard railing was placed.

The bid amount was \$378,048.00. The proposed final estimate was \$399,483.59.

The proposed final estimate was mailed to the contractor on December 20, 1999, and was returned with six (6) exceptions on January 14, 2000. The total amount of the exceptions is \$16,155.78. Claim resolution meetings held:

- Field review meeting (resident engineer, construction engineer, and contractor) January 31, 2000.
- District claim meeting May 30, 2000.

### Summary of Resolved Claims

<i>Claim No./Title</i>	<i>Claimed</i>	<i>Resolved Amount</i>
Claim #3 – Hancock Steel	\$ 490.00	\$ 490.00
Claim #4 – Item 27-12.3M	\$ 4,920.00	\$ 4,920.00
Claim #5 – Item 30-15.14M	\$ 1,676.40	\$ 0.00
Claim #6 - CCO #1-DEWR's 4 and 7	\$ 135.37	\$ 130.95
Claim #7 – CCO #3-DEWR's 10 and 21	\$ 776.49	\$ 776.49
Total Claim Amounts Resolved	\$ 7,998.26	\$ 6,317.44

### Summary of Unresolved Claims

	<i>Claimed Amount</i>	<i>Resolved Amount</i>	<i>Remaining Amount</i>
Claim #2 – Paving Claim	\$ 8,157.52	\$ 0.00	\$ 8,157.52
Total Claims Amounts Unresolved	\$8,157.52	\$0.00	\$8,157.52



**BACKGROUND**

Section 10-1.01, "Order of Work," of the Special Provisions and Sheet SC-1 of the Contract Plans require the contractor to construct this project in two stages. The planned order of work requires that public traffic remains on a paved surface at all times.

Stage 1 construction consisted of placing public traffic on the existing east bound lane, paved shoulder, and a portion on the existing west bound lane while constructing the planned west bound lane and shoulder. Stage 1 work also required replacing existing culverts with a double corrugated steel pipe culvert under the west bound lane and shoulder.

Stage 2 construction consisted of placing all public traffic on the newly constructed westbound lane and shoulder and constructing the planned eastbound lane and shoulder and completing the double corrugated steel pipe culvert.

On August 31, 1999, the contractor planned to place public traffic on a portion of the westbound lane prior to the lane being built to the planned finish grade and paved. The contractor proposed that traffic would run on the slurry cement backfill. The resident engineer required the contractor to backfill the upper portion of the trench with asphalt concrete to provide a paved roadbed for the safety and convenience of public traffic.

**NOTIFICATION**

Date of Event: August 31, 1999 to September 2, 1999

Notice of Potential Claim: September 10, 1999

Notification was timely?: Yes

**APPLICABLE SPECIFICATIONS**

Special Provisions: Section 10-1.01, Order of Work

**CONTRACTOR'S POSITION**

The contractor's notice of potential claim letter dated September 10, 1999 (see Exhibit 2) states: "The contract only species that traffic runs on pavement. Our proposal was that when we temporarily shifted traffic back over the completed culvert, we would run the traffic

on the slurry backfill. Slurry backfill is a hard concrete surface and meets the requirements for pavement. Caltrans made us backfill the top part of the trench with 100 mm of asphalt concrete. Caltrans should pay us the additional cost of the asphalt concrete.”

Submitted with the notice of potential claim was a breakdown of labor, equipment and materials for placing 100 mm of asphalt concrete in the upper portion of the trench. The total cost was calculated using a force account analysis.

### **DISTRICT CONSTRUCTION'S POSITION**

Contract Plans and special provisions require that this project is to be constructed in two specific stages and traffic was to remain on a paved surface throughout the project. The contractor wanted to construct the project outside of the planned construction stages for its convenience and cost savings. However, the contractor was informed by the resident engineer that if it wanted to construct the project outside of the planned construction stages, it must provide a paved roadway at all times for the safety and convenience of public traffic.

The contractors proposal to place traffic on slurry cement backfill was not acceptable. Slurry cement backfill is not pavement. In addition to slurry cement backfill not meeting the definition for pavement it is a poor surface and will spall and create a dangerous condition.

### **CONCLUSION**

Central Region Construction concludes there is no merit to Claim No. 2, because placing traffic on slurry cement backfill does not fulfil the contract requirement that public traffic will always be on a paved surface.

## Example 5-4.3 Sample Claim Position Letter

CERTIFIED MAIL – RECEIPT REQUESTED  
(Date)

(EA)  
(Co-Rte-Kp)

(Contractor)  
Attn: (Project Manager)  
(Address)

Gentlemen:

District construction has completed its review of the two exceptions (claims) that you filed in your response to the proposed final estimate. These exceptions for the referenced project totaled \$ (amount). Attached for your use is a copy of the construction claim report containing detailed findings, dated (date).

Regarding unresolved claims number. 1, and number 2, district construction finds no merit. The total amount unresolved is \$ (amount). We request that you drop the unresolved claims. If, however, you do not agree with the findings in this claim position letter, you must request a board of review meeting within 15 calendar days of receipt of this notice.

If you do not request a board of review meeting within the 15 calendar days, it will be assumed that you have accepted the district's conclusions as stated in this claim position letter. You are reminded that if you do not participate in a board of review meeting, which is a required administrative procedure in the Caltrans claims resolution process, you will be barred from arbitration in accordance with Section 10240.2 of the *Public Contract Code*.

Should you request a board of review meeting, the district will convene a board of review for the remaining claims. You will be notified of the time and place for the board of review meeting when these details have been determined.

Sincerely,  
Division of Construction Chief

Attachment

cc: RE  
CE  
CM  
District Construction claims engineer  
District/Region Construction Office  
Construction field coordinator  
Division of Construction contract specialist (claims)

## Example 5-4.4 Sample Final Estimate Letter--No Board of Review Attended

STATE OF CALIFORNIA--BUSINESS, TRANSPORTATION AND HOUSING AGENCY

GRAY DAVIS, Governor

### DEPARTMENT OF TRANSPORTATION

District X Construction  
P.O. BOX #X  
(ADDRESS)  
(PHONE)  
(FAX)



#### CERTIFIED MAIL RETURN RECEIPT REQUESTED

(date)

(Dist-EA)

(Dist-Co-Rte-PM/KP)

Federal Aid Project: (FA#)

(Contractor)

(Address)

Gentlemen:

We have not received a written response from you regarding the district's (date of claim position letter) determination on your claims within fifteen days as requested in the claim position letter. Because you failed to respond to our claim position letter, we assume you agree with the district's positions on claims. We are issuing the final estimate as authorized by Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications* and in accordance with the claim position letter that was previously sent to you. Enclosed is a copy of the final estimate.

Participation in a board of review meeting is a required administrative procedure set forth in the contract as part of Caltrans claims resolution process. Your failure to participate in the board of review meeting constitutes a bar to arbitration, in accordance with Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications*.

This letter is the district director's final determination of claims and is based on the claim position letter that we sent to you. The claims resolution process under the contract is now concluded.

Sincerely,

(NAME)

District Director,



## Example 5-4.5 Sample Final Estimate Letter--Board of Review Attended

STATE OF CALIFORNIA--BUSINESS, TRANSPORTATION AND HOUSING AGENCY

GRAY DAVIS, Governor

### DEPARTMENT OF TRANSPORTATION

District X Construction

(ADDRESS)

(PHONE)

(FAX)



#### CERTIFIED MAIL RETURN RECEIPT REQUESTED

(date)

(Dist-EA)

(Dist-Co-Rte-PM/KP)

Federal Aid Project: (FA#)

(Contractor)

(Address)

Gentlemen:

On (date of board of review meeting), the district convened a board of review meeting, which is a required administrative procedure set forth in the contract as part of Caltrans claims resolution process.

We are issuing the final estimate as authorized by Section 9-1.07B, "Final Payment and Claims," of the *Standard Specifications* and in accordance with the determination of claims provided in the board of review meeting. Payment in the amount of \$ (amount) on claim no.'s (1, 2, etc) will be paid on the final estimate. This amount fully resolves claim no. (1, 2, etc). Enclosed is a copy of the final estimate.

This letter is based on the district director's final determination of claims sent to you on (date) and on the board of review recommendations provided on (date). The claims resolution process under the contract is now concluded.

Sincerely,

(NAME)

District Director,

Attachment

## Example 5-4.6 Attachment to Audit Request

### Summary of Delay-Related Claims

Contract No.:

Contractor:

Claim No.	Claim Description	Amount Claimed (A)	District Analysis (B)	Audit Needed (C)
<u>Delay Claims</u>				
3	FOO	\$22,011.06	\$0	\$22,011.06
4	HOO	\$11,655.88	\$0	\$11,655.88
5	Labor Cost Increases	\$5,987.00	\$0	\$5,987.00
6	Material Cost Increases	\$7,685.00	\$7,685.00	\$0
7	Material Storage Costs	\$3,877.00	\$0	\$3,877.00
<u>Impacted/Unproductive Item Work</u>				
8	Item #4 - Traffic Control	\$8,012.98	\$0	\$8,012.98
9	Item #9 - Roadway Excavation	\$4,409.76	\$4,409.76	\$0
<u>Subcontractor Claims</u>				
12	WWW Fence Co. Material Costs	\$9,894.03	\$9,894.03	\$0
13	Electrical Experts, Inc. Labor Cost Increases	<u>\$2,288.09</u>	<u>\$0</u>	<u>\$2,288.09</u>
<u>TOTALS</u>		\$75,820.80	\$21,988.79	\$53,832.01

(A) Amounts claimed by the contractor.

(B) Amounts which district staff can research and analyze for possible entitlement

(C) Amounts should be audited for possible entitlement.